

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE WESTERN DISTRICT OF OKLAHOMA

3 ALICE SHACKELFORD

4 Plaintiff,

5 No. CIV-18-0456-HE

6 vs.

7 AMERICAN INCOME LIFE
INSURANCE COMPANY

8 Defendant.

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12                   DEPOSITION OF

13                   STEVEN PLITT, ESQ.

14

15                   July 24, 2019

16                   10:00 a.m.

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18                   1850 North Central Avenue  
Suite 2400  
19                   Phoenix, Arizona

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25                   Talia Douglas, RPR, CR No. 50775

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1 processing the Shackelford claim are not inconsistent with  
2 the covenant of good faith and fair dealing.

3 A. Right. And the type of mistakes are not  
4 violative -- the types of mistakes that were made are not  
5 violative of the covenant of good faith and fair dealing.

6 Q. And then on page 33, opinion 7, generally,  
7 American Income's processing of the Shackelford accidental  
8 death benefit claim complied with industry standard in  
9 practice, except for the mistakes identified herein.

10 A. Yes.

11 Q. Any changes or revisions --

12 A. No.

13 Q. -- that need to be made?

14 Number 8, American Income's processing of the  
15 Shackelford accidental death benefit claim complied with  
16 the implied covenant of good faith and fair dealing. The  
17 mistakes that were made did not rise to the level of  
18 breaches of the implied covenant of good faith.

19 Is that still your opinion?

20 A. Yeah. I would, again, exchange breaches for were  
21 not inconsistent with the implied covenant of good faith  
22 and fair dealing.

23 Q. What's the difference between breaching and not  
24 being inconsistent?

25 A. I just don't want there to be any confusion that

1 I'm not offering a legal opinion.

2 Q. Does the substance of the opinion change with that  
3 language or is it -- or is it just a means of making sure  
4 that the judge knows you're not stepping on his toes?

5 A. I just don't want the judge to think I'm stepping  
6 on his toes.

7 Q. Okay. And then you disagree with Mr. Welch's  
8 opinion on a number of issues, and we'll go ahead and get  
9 to those later.

10 Let's go back to page 24, if we could.

11 Mr. Plitt, do you know the elements that Ms.  
12 Shackelford must prove in order to prevail in her bad faith  
13 claim in this case?

14 A. Sure.

15 Under Oklahoma law, she must prove that there  
16 was a contract. She must prove that the insurance company  
17 acted unreasonably. She must prove that they acted more  
18 than with negligence, but less than what is required for  
19 punitive damages. And she must prove damages flowing there  
20 from.

21 She -- I think you also have to prove that  
22 it's a covered claim.

23 Q. You stated it exactly as I would have. That's  
24 exactly right.

25 A. Every once in a while, I get it right.

1           Q.    A number of fun colloquialisms to express that  
2   thought.

3                 I found the Brown case that I was talking  
4   about earlier. This is from page 734 of the Brown versus  
5   Superior Court in and for Maricopa County, 670 P second  
6   725.

7                 And the quote that I like is that, further,  
8   bad faith actions against an insurer, like actions by a  
9   client against an attorney, patient against a doctor, can  
10   only be proved by showing exactly how the company processed  
11   the claim, how thoroughly it was considered, and why the  
12   company took the action that it did.

13                And I think that we established earlier that  
14   one of the important questions that any litigant here has  
15   to answer is, one, why did the insurance company take the  
16   action that it did, right?

17               MS. TERRY: Object to the form.

18               THE WITNESS: In a general sense, that's  
19   true.

20   BY MR. ROWE:

21               Q.    Many of your opinions deal with the reasonableness  
22   conduct that American Income took in handling this claim,  
23   right?

24               A.    Yes.

25               Q.    How do you define reasonableness?

1           A. Well, it's almost like the old supreme court adage  
2 of pornography. You know it when you see it.

3                 Even an old dog knows when it's been kicked  
4 versus tripped over. You know, it's -- it's, does it  
5 confirm to what -- let me take a step back.

6                 Reasonableness is a continuum for purposes of  
7 all bad faith standards throughout the United States  
8 because the common denominator is reasonableness.

9                 Some jurisdictions have a pure scienter  
10 element. Some don't. Some have a heightened, I call it,  
11 unreasonableness plus standard. And generally what  
12 unreasonable means -- the only way to understand what  
13 reasonable means is to understand the negative of  
14 reasonable.

15                 So if I were explaining this to my students,  
16 which is what I would do, I would say, when you look at  
17 standards that are based on reasonableness for bad faith,  
18 it is difficult to find out what that means, except to look  
19 at the absence of it.

20                 Because many jurisdictions have said that if  
21 there's any reasonable support for the decision, then it is  
22 not, by definition, unreasonable. So I tell my students to  
23 look for the absence of reasonableness instead of looking  
24 for reasonableness.

25                 And so if there's a basis for them to do what

1       they did from -- in the claim environment, then you may  
2       have a situation where, on a continuum of reasonable  
3       alternatives, this is one of them.

4                   And even though you may prioritize them with  
5       some being most reasonable and others being less reasonable  
6       but still on continuum of reasonableness, that's how you  
7       determine reasonableness.

8                   So it's not -- it's best to find in its  
9       absence, and it's -- if you're on a continuum, be weary not  
10      to say just because something is more reasonable than a  
11      lesser reasonable alternative that somehow that makes it  
12      unreasonable.

13                  You have to fall off -- I call it the  
14      Christopher Columbus principle. You've got to sail your  
15      boat off the edge of the earth because the flatness of the  
16      earth is the reasonableness scale. That's the best I can  
17      do.

18      Q.    Okay. And there's a lot to unpack there.

19      A.    Yes.

20      Q.    I'm going to start at the top.

21                  You used a -- you used a Latin term.

22                  Is that a Latin term, scienter?

23      A.    Scienter. Yeah, it probably is --

24      Q.    Okay.

25      A.    -- but --

1           Q.     I recognize the word, but I have no idea what that  
2 means.

3                         And if I -- I'm sure that I did one at one  
4 point.

5           A.     Improper state of mind --

6           Q.     Okay.

7           A.     -- or in the criminal context, state of mind to  
8 harm.

9           Q.     If I were to use it in context --

10          A.     It's --

11          Q.     -- that's where I would have went. I just wanted  
12 to make --

13          A.     It --

14          Q.     -- sure.

15          A.     -- really is state -- it's a state of mind with  
16 intent to harm.

17                         So in the criminal context, you had scienter.  
18 You intended.

19          Q.     And in the State of Oklahoma, for Ms. Shackelford  
20 to prevail, does she have to prove an intent to harm or  
21 some sort of other evil intent on the part of American  
22 Income?

23          A.     I imagine you're going to ask me several questions  
24 like this, so let's just get it on the front side. I'm  
25 going to answer them --

1           Q.    **Okay.**

2           A.    -- but I'm not offering that as a legal opinion.

3       I'm just answering your question. Okay?

4           Q.    **Okay.**

5           A.    My understanding is that you don't have the  
6       traditional scienter element.

7                   Your standard -- and Oklahoma is a little  
8       difficult to quite place because it's unreasonableness  
9       plus.

10                  There's some additional element that is more  
11       than negligence, which is you acted unreasonably or in the  
12       absence of a reasonable basis.

13                  No court has spelled out exactly what that  
14       means other to set the boundary line. It's less than what  
15       it would be required for punitive damages.

16                  Q.    **Okay. So moving forward as we go through some of**  
17       **these opinions, I would like to give you a road map for**  
18       **what I would like to do for the rest of the day.**

19                  A.    Okay.

20                  Q.    And this will be our road map until we get to Mr.  
21       Welch's opinions.

22                  You offered a number of opinions that to me  
23       look a lot like legal opinions, whether or not an action  
24       was reasonable, whether or not an action or a series of  
25       actions was violative or consistent with the duty of good

1       faith and fair dealing.

2                   And what I would like to do is I would like  
3       to figure out what standards you used in order to come to  
4       those conclusions because I think the facts in this case  
5       are what they are.

6                   I want to know what standards you applied  
7       those facts to, and in order for me to do that, we have to  
8       do some definition work here.

9                   And reasonableness for you is based on a  
10      continuum of reasonableness.

11                  And you would teach your students that  
12      reasonableness is best defined by that which has, in the  
13      past, been determined to be not reasonable, right?

14                  A.     No.   It's the absence of a reasonable basis.

15                  In other words, you look at it and you can  
16      find no reasonable rational basis for what you're doing,  
17      for what they did.

18                  At least that is typically what the courts  
19      look to for unreasonableness.

20                  Q.     Okay.   Is your position that what is or is not  
21      reasonable in an insurance context is best defined by what  
22      is or is not reasonable?

23                  A.     No.   It's a difficult concept as a matter of law.  
24      It's best figured out by looking at the absence of  
25      reasonableness.

1                   Because if it is reasonable to some degree,  
2   it falls on a continuum. And falling on a continuum with  
3   some being less reasonable but still reasonable and others  
4   being more reasonable than alternatives, by definition, it  
5   becomes reasonable.

6                   And therefore, you don't have even the  
7   negligence element of a bad faith claim, which requires as  
8   one of its constituent elements unreasonableness.

9       Q.   So -- and I told you earlier, sometimes I can be  
10   dense, Mr. Plitt.

11                  The way that I see this is that at some point  
12   we're going to go to trial and the jury is going to be  
13   tasked with answering questions like, is this reasonable.

14                  And they're going to be looking into a world  
15   that we both agreed is more complex than the world in which  
16   they probably live in and that there are a set of rules and  
17   standards and behaviors in that claims environment that  
18   maybe are foreign to them, right?

19                  MS. TERRY: Object to the form.

20                  THE WITNESS: Sure.

21   BY MR. ROWE:

22       Q.   And you, as an expert witness, are there to offer  
23   testimony based on your years of training and experience  
24   that would assist them in making those determinations,  
25   right?

1           A.     Yes.

2           Q.     One of the ways I see that you can assist them in  
3     doing that is to establish for them standards of baseline  
4     conduct.

5                         But in order for me to understand how you  
6     evaluate that conduct, the reasonableness of that conduct,  
7     I think we have to get into the standards that define  
8     reasonableness.

9                         MS. TERRY: Object to form --

10                  THE WITNESS: I think you're going about --

11                  MS. TERRY: -- vague.

12                  THE WITNESS: You can go about it however you  
13     want, and we can make this as complex as you want. It's  
14     not that complex to me.

15                  When I look at a case like this given the  
16     standard in Oklahoma, I'm asking myself fundamentally this  
17     question. This is what they did, and is there a reasonable  
18     basis for them to do that. And secondly, is there any  
19     indication they purposely intended to harm the insured by  
20     doing what they did.

21                  Because even if it tends to be reasonable, if  
22     their intent was to harm, then that's an improper motive  
23     anyway, so --

24     BY MR. ROWE:

25     Q.     That's like fast forwarding.

1           A. Well, that's what I -- that's how I look at this.

2       And we can talk about how many angels are dancing on the  
3       head of a pin.

4           What I'm going to be talking about is, based  
5       on what people do and the insurance industry and claim  
6       environments, were these reasonable goals in how they set  
7       it up? Was there a reasonable basis for what they were  
8       doing, recognizing that it may not be the most efficient?

9           But that's an evaluation the jury can or  
10      cannot decide. Certainly there are lots of alternatives,  
11      but does it fall on the continuum or does it sail off the  
12      edge of the earth?

13           And secondly, do I find any indication of  
14      intent to purposefully use the claim process to harm the  
15      insured. Those are the things I'm looking for.

16           I'm not sitting here talking to the jury  
17      about all the standards and everything else. You can ask  
18      me those questions, and I'm going to try to answer them,  
19      but they tend to be very nebulous.

20           But it's simple for me, and it's -- it's kind  
21      of like this. Even an old dog knows when it's been tripped  
22      over or kicked. Can you be precise with things? No. But  
23      I've seen enough claims in my life to know when things are  
24      not right and that they're wrong, and that's how I will  
25      help a jury.

1                   Because I have years and years and years of  
2 looking at thousands of claims, and I have a sense for what  
3 is reasonable, what are reasonable goals in a claim  
4 environment, and that's what I'm going to talk about. The  
5 jury will have to decide whether they agree with that or  
6 not.

7                   So I hope that doesn't derail the discussion,  
8 but that's --

9       **Q. I think that --**

10      A.     I think you're making it much more complicated  
11 than what my goal is.

12      **Q. I think, Mr. Plitt, that might put us on a course**  
13 **for exactly where I wanted us to go.**

14      A.     Okay. Good.

15      **Q. Let's look at page 25, and I'm looking through the**  
16 **first partial paragraph that begins with investigation and**  
17 **three lines down.**

18                  In your report here, you're talking about  
19 kind of the process that American Income should go through  
20 in processing or handling the Shackelford claim.

21                  And you write, "The first question to be  
22 resolved in the accident death benefit context is whether  
23 the death occurred from natural causes or some form of  
24 external cause," right?

25      A.     Well, generally, given this policy platform.